SUPREME COURT, U. S.

JUL 10 1968

JOHN F. DAVIS, CLERK

No. 202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

LEE RUBBER & TIRE CORPORATION,

Petitioner,

v.

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, AN UNINCORPORATED ASSOCIATION, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 227, AN UNINCORPORATED ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

SAMUEL L. ROTHBARD,
ABRAHAM L. FRIEDMAN,
ROTHBARD, HARRIS & OXFELD,
744 Broad Street,
Newark, New Jersey, 07102,
Attorneys for Respondents.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT:	
I	9
II	11
III	13
CONCLUSION	15

Cases Cited

Burnrite Coal Briquette Company v. Riggs, 274 U. S. 208 (1927)	14
Commercial Casualty Co., Inc. v. Consolidated Stone Co., 278 U. S. 117 (1929)	14
Denver & R. G. R.R. v. Brotherhood of R.R. Trainmen, 387 U. S. 556 (1967)	13
Drake Bakeries v. Local 50, American Bakery, etc. Workers, 370 U. S. 524 (1962)	2
Industrial Additional Association v. Commissioner of Internal Revenue, 323 U. S. 310 (1945)	14
International Association of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd, 297 N. Y. 519, 74 N. E. 2d 467	11
NLRB v. Jacobs Mfg. Co., 196 F. 2d 680 (2 Cir. 1952)	12

PAGE

Panama R.R. Co. v. Johnson, 364 U. S. 375 (1925)... 13

Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965) 2

Retail Clerks Int'l Assn. v. Lion Dry Goods, Inc., 369 U. S. 17 (1962)..... 11

Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957) 14

United Steelworkers of America v. American Manufacturing Co., 363 U. S. 564 (1960).....2, 10, 11

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960)..... 2, 10

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960).....2, 10-12

Statute Cited

National Labor Relations Act..... 12

Rule Cited

F. R. Cv. P.:

12(b)(3) 13

Texts Cited

Taft-Hartley Act:

Sec. 301 ..... 7, 14

Sec. 301(c) 1, 13

28 U.S.C.:

Sec. 1391(c) 14

Sec. 1406(b) 13

29 U.S.C.:

Sec. 185 ..... 7, 14

Sec. 185(a) 11

Sec. 185(c) 8

Questions Presented for Review

1. Whether grievances challenging the right of the Company to terminate during a lawful strike all welfare benefits provided for in two unexpired welfare agreements came within the arbitration provisions in said welfare agreements incorporating by reference the arbitration provisions in the working agreements?

2. Whether Section 301(c) of the Taft-Hartley Act prescribes jurisdiction or merely venue?

3. Whether the division of negotiated terms and conditions governing wages, hours and other conditions of employment negotiated between a union and an employer into two separate agreements (a working agreement and a welfare agreement) converts the provisions in the welfare agreement into a "commercial" document and removes from the grievances and arbitration provision therein the favorable rule applicable to collective bargaining agreements?

Counter-Statement of the Case

In this case the courts below declared that certain grievances filed by Respondents Unions with Petitioner Employer were arbitrable and commanded the Respondents to participate in the selection of the 3-member Board of Arbitration, as provided in the applicable agreement.

Thus, the Petitioner is asking this Court to reconsider and reverse or modify the very principles which were decided by this Court in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Drake Bakeries* v. *Local 50, American Bakery, etc. Workers,* 370 U. S. 524 (1962), and *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965), and a host of cases wherein this Court simply denied *certiorari.*

The controlling facts can be stated simply. For many years Petitioner (hereinafter called "the Company") operated two plants, one in Youngstown, Ohio, and the other in Conshohocken, Pennsylvania, wherein its employees were represented by sister Locals of the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Local 102 being at Youngstown and Local 227 being at Conshohocken. (Stip. R. 25, R. 27).[1]

At each plant the terms negotiated were put into 2 documents, one a "Working Agreement", the other a "Welfare Agreement". These having expired, new contracts

---

[1] All references to "R" are to the Record consisting of Appellant's printed Appendix in the Court of Appeals; all references to "A" are to the Appendix to the Petition for Writ of Certiorari in this case consisting of the opinions of both lower courts. All emphasis is counsel's, except where otherwise indicated.

were signed at both plants; at Youngstown the new working agreement was signed July 3, 1961 and was for two years and the new welfare agreement was effective as of July 1, 1961 and was for five years (R. 26); similarly, at Conshohocken the working agreement was dated June 30, 1961 and was for two years and the welfare agreement was effective the next day and was for five years (R. 27, R. 28).

Each working agreement contained the customary provisions for recognition, wages, hours, seniority, grievance and arbitration, no-strike, etc. Each welfare agreement contained a series of subdivisions numbered as "Articles", each dealing with a particular variety of welfare benefit, all being contained in a single document with one set of signatures at the end thereof. Each article or group of articles contained a grievance and arbitration provision broad enough to cover the questions arising under that type of welfare benefit and each incorporated by reference the arbitration procedure of the working agreement.

At Conshohocken the welfare agreement (Ex. 7 to Stip., R. 105 and 110) contained provisions dealing with the following benefits:

Article I—Pension Plan (R. 110)—not involved herein. General Arbitration clause set out in Article I, Sec. VI, par. 1 at R. 130-131.

Article II—Service Award and Special Distributions on Discontinuance of Operations (R. 134)—not involved herein. General arbitration clause set out in Article II, Sec. II, par. 1 at R. 135.

Article III—Insurance Program (R. 139)—The crux of this case—contains the following subdivisions:

> Section I. Hospitalization, Surgical-Medical and Health and Accident (R. 139).

Section II. Group Life Insurance and Non-Occupational Accidental Death and Dismemberment Insurance (R. 150).

Section III. General Provisions (153a). General arbitration clause for Art. III set out in Article III, Section III, par. F at R. 154.

Article IV—Supplemental Workmen's Compensation Benefits (R. 155). General arbitration clause set out in Article IV, Sec. G at R. 157.

Article V—Duration and Termination (R. 158), including a no-strike provision.

Article III of the Conshohocken Welfare Agreement is clearly entitled "Insurance Program" (R. 139, 2 places); and in subpart I, Hospitalization, etc., states: "Benefits will be provided by the *Company* and without costs to Employees * * *". (R. 139). Under "Sickness and Accident Benefits" the Welfare Agreement provides that "Employees who become disabled shall notify the *Employing Company's Insurance Department*" (R. 145). Under "General Provisions" for subpart III, the Company is given the *option* to take out insurance policies; but will remain "liable for benefits described in this Insurance Program which are not provided in said insurance contracts"[2] (R. 154). And, finally, "In the event any dispute shall arise based on the question whether the company has provided the insurance *benefits* hereinabove described, such dispute shall be subject to the grievance procedures of the Working Agreement * * * including arbitration".

---

[2] The Petitioner in its brief as appellant in the Court of Appeals (at p. 25) conceded that this sentence states what is "clearly implied" in the other Welfare Agreement, where it is not expressly stated.

And the Working Agreement at Conshohocken clearly stated that "In the event a complaint, grievance or dispute *filed by either of the parties* to this agreement remains unsettled * * * either party may * * * thereafter notify the other party in writing of its desire to submit the matter to a Board of Arbitration * * * [whose] decision shall be final and binding on all parties." (R. 100 f), with the only exception there specified being that a "question of a general or plantwide wage adjustment cannot be submitted to a Board of Arbitration for settlement" (R. 101), and in the Welfare Agreement there are special provisions under the Pension Plan for physicians to determine with finality the question of permanent disability (R. 131).

The Respondents (Unions) believe that the authority of an Arbitrator to decide "whether the Company has provided the insurance *benefits*" clearly includes issues as to the duration of the obligation, conditions affecting the duration of the obligation, as well as many others and clearly including the issues which arose from the Company's letters announcing its termination of the benefits under the welfare agreements which still had 3 years to run. The Court of Appeals stated this, although in other words, saying:

> "Thus the issue ultimately to be resolved is whether defendant was required to continue to make any or all of the particular benefits available during a strike. We think it may fairly be inferred from the language of the arbitration provision that the parties intended this matter to be covered by such [arbitration] provision." (A. 21).

The welfare agreement at Youngstown had similar provisions (Ex. 2 to Stip., R. 37 & 43).

At each plant the working agreement expired June 30, 1963, while each welfare agreement still had three years to run; the parties knew of the different lengths of the terms and provided special conditions in anticipation thereof (R. 87 f; R. 158 f). At each plant following lengthy unsuccessful negotiations and the expiration of the working agreement there was a strike.

At Conshohocken, the Company during negotiations by letter informed Local 227 that it was not going to keep any of the benefits under the Welfare Agreement in force (R. 167), and advised (R. 169) that "if the Union and/or the striking employees would pay the respective premium by making such payments to the Company which would in turn pay them to the insurance company" the benefits could be kept in force.

Local 227 then sent the Company its Grievance No. 259 protesting the Company's announced intention to terminate the benefits (R. 173). The Company by letter rejected this grievance (R. 176). The International Union sent the Company 15 monthly payments totalling $56,806.20 (R. 107, R. 198) to keep the insurance in force. The strike there was never settled with the Company.

At Youngstown there were similar letters by the Company to the Union stating the Company was terminating all benefits under the welfare agreement and similar grievance filed by the Union and rejected by the Company. At Youngstown the Union sent two payments totalling $17,884.48; negotiations were successful and a new working agreement was signed, effective November 1, 1963. The strike there then ended and the employees returned to work.

In 1956 the Company had applied for and was granted authority to do business in the State of New Jersey; it

withdrew from New Jersey in 1964, 9 months after this suit was begun (R. 199). The Unions started this suit on December 12, 1963, pleading jurisdiction under Section 301 of the Taft-Hartley Act (29 U.S.C. §185); the Company answered and simply denied this allegation.

The thrust of the Complaint was that each Welfare Agreement required the Union appointed member of the 3-member Board of Arbitrations and the Company appointed member to "jointly request the American Arbitration Association to appoint the Chairman of the Board of Arbitrators", and that the Company had violated the Agreements by refusing to process the grievances and refusing to participate in the selection of the Board of Arbitrators (R. 9 & 14); and the relief sought was that the Court declare (1) that the grievances were arbitrable, (2) that the Company breached its agreements by refusing to recognize said grievances and process them in accordance with the agreements, etc.

The parties entered into an extensive Stipulation of Material Facts (R. 25) and an Appendix of 14 exhibits (R. 31 to 199). When the case came before the District Judge on cross motions for summary judgment, the Court entered an order for a further amendment to the Complaint and pursuant thereto the Unions added a Third and Fourth cause of action seeking alternative relief by way of damages if arbitration was not compelled (R. 184); the Company pleaded not only to the new Third and Fourth Causes of Action, but purported to also plead to "all counts" raising for the first time questions of venue and jurisdiction (R. 189); this new answer raising the question of venue was filed 17 months after the original answer not raising such question (R. 2). The Unions moved to limit the new pleading to the Third and Fourth causes of action (R. 192).

The District Court heard oral argument supplementing the Stipulation, Exhibits, Affidavit and many briefs. On June 19, 1967 the District Court Judge filed his opinion (R. 200) in favor of the Unions, finding that 29 U.S.C. §185 (c) relates to venue and not to subject matter jurisdiction; that objection to venue could be waived and was waived when the Company filed its original answer making no specific reference to venue either in the answer or by motion before answering. The Court's opinion states that "there is tacit admission in the arguments of Defendant that it did not conceive the defense of improper venue until a late stage in the litigation" (R. 210). The Court concluded that the failure of the Company to interpose a timely defense of improper venue was a waiver of that defense (R. 211).

Turning to the main question of whether the Unions' grievances were arbitrable (R. 211) the Court found that "the welfare agreements provide *for the benefit*" and that upon the face of the agreements there was evidence from which it might be determined that an arbitrable issue existed and, in so finding, the Court resolved all doubt in favor of arbitration (R. 213).

Judgment was entered denying the Company's motion for summary judgment and granting the Unions' motion for summary judgment on the First and Second Causes of Action and directing arbitration of the grievances set forth in the Complaint (R. 215).

The Company appealed to the Court of Appeals for the Third Circuit. That Court (A. 18), affirmed the judgment of the District Court, holding, *inter alia*, (1) that the word "jurisdiction" as used in 29 U.S.C. §185 (c) refers to venue rather than to jurisdiction; that the District Court had subject matter jurisdiction and that the venue challenge was not seasonably raised, as required, and there-

fore could not be deemed to be a defense to the action; (2) that the issue ultimately to be resolved was whether the Company was required to continue to make any or all of the particular benefits in dispute available during the strike and that it could "fairly be inferred from the language of the arbitration provision that the parties intended this matter to be covered by such provision"; (3) that the limitation which the Company suggests regarding arbitration "is not fairly found in the language employed in the agreements"; (4) that the contention of the Company that the parties specifically excluded from arbitration the issue which the Union seeks to arbitrate was wrong; (5) that the agreement to arbitrate the dispute under the welfare agreement was not conditioned on a requirement that the working agreement then be in existence; and (6) that the conclusions reached with respect to Local 102 were equally applicable to Local 227's agreements.

ARGUMENT

I.

The only important question which the Petitioner (Company) asks this Court to review by Writ of *Certiorari* (Pet. 11) is whether the Company is required to settle by arbitration the dispute over its obligations as to certain welfare benefits under the Welfare Agreement with each local union. The decisions of this Court are cited above at the beginning of the Counter-Statement of the Case.

The basic dispute between the parties is whether the Company was obligated to provide the various insurance benefits for the duration of the Welfare Agreements (5 years). But this is a dispute which an arbitrator must resolve, and is not the question which was before the lower Courts—whether under the arbitration provisions

of the collective bargaining agreement (meaning thereby the welfare agreements *and* the working agreements) the Company was obligated to submit the dispute to arbitration.

In granting summary judgment the Courts below did no more than heed the admonition of this Court in the three *United Steelworkers* cases, *supra,* that the Court should not attempt to resolve the merits of industrial grievances under the guise of determining whether they are arbitrable. As this Court said in *Warrior & Gulf,* "The Court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." 363 U. S. at 585.

By the Welfare Agreement at Conshohocken, for example, the Company obligated itself to provide certain *benefits* (R. 139 ff) (for which it could, at its *option,* buy insurance coverage (R. 154) and then provided that

> "In the event any dispute shall arise based on the question whether the Company has provided the insurance *benefits* hereinabove described, such dispute shall be subject to the grievance procedure of the Working Agreement * * * including arbitration * * *." (R. 154 f).

The District Judge concluded that "the Welfare Agreements provide for *the benefits* (emphasis Court's) and whether they are furnished by funding the same or by direct assumption of the obligation to furnish them" went only to the remedy and that such disputes were arbitrable (A. 13-14). The Court of Appeals agreed. We submit this Court should not review their rulings.

II.

The argument by the Petitioner (Pet. 15) that all or some of the various parts of the welfare agreements should be treated as "commercial or insurance agreements" and not as collective bargaining agreements, is an attempt to slip the discredited doctrine of *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N. Y. S. 2d 317, affd. 297 N. Y. 519, 74 N. E. 2d 467 under the door closed by this Court in *United Steelworkers of America* v. *American Manufacturing Company*, 363 U. S. at 567.

The Unions and Company negotiated the working agreements and welfare agreements obviously as a package at each plant; surely what was yielded in one agreement financially was carefully considered by the parties in deciding what went into the other agreement; merely because the provisions are collected into two separate documents, one running for two years and the other for five years, bearing in mind that the parties contemplated a continuing relationship, does not convert the welfare agreement from being a collective bargaining agreement into something else—or, more accurately in the words of the Statute—into something other than "contracts between an employer and a labor organization representing employees in an industry affecting commerce" (29 U.S.C. 185(a)). *Retail Clerks Int'l Assn.* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962).

As this Court emphasized in *Warrior & Gulf, supra*, arbitration in commercial cases is the substitute for litigation, whereas arbitration of labor disputes under a contract between employer and a labor organization is a substitute for industrial strike and is "part and parcel of the collective bargaining process itself" (363 U. S. at 578). Here the Company was very careful to insinuate into each

welfare agreement no-strike provisions similar to those in the working agreements (R. 87 & 159). Each welfare agreement contained a pension plan which expressly provided that disputes between any employee as to eligibility for, or amount of payment of, pension benefits may be taken up as a grievance under the working agreement and thence to arbitration *with the Company!* (R. 62). Is the Company entitled to have only the pension part of the welfare agreement treated as a collective bargaining agreement and the other parts treated as commercial insurance? Surely not. The same arguments and conclusions apply to the obligation to pay Service Awards (R. 64).

Finally, and perhaps conclusively, the Company obtained the insertion in each Welfare Agreement of a provision reading:

> "This Agreement constitutes a settlement for the duration of this Agreement of all issues with respect to the subject matter covered hereby, and, while this Agreement continues in effect, the Company shall have no obligation to negotiate or bargain with the Union with respect to any subject matter covered hereby, nor shall there be any strike or work stoppage with respect to such matters." (R. 159 & 87).

Such a provision is only understandable if the document is a collective bargaining contract since its purpose is to relieve the Company of the need to bargain collectively as required by the National Labor Relations Act. *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (2 Cir. 1952).

Clearly, the Welfare Agreements are "part and parcel of the collective bargaining process itself"; *Warrior & Gulf*, 363 U. S. at 578; and the rules regarding arbitration enunciated in the triology apply, and not those relating to commercial arbitration.

III.

The Company urges as its last point that the District Court did not have subject matter jurisdiction of this action under Section 301 (Pet. 17). In support, the Company urges the interpretation that Section 301 (c) limits jurisdiction over the subject matter of this suit to the District Court having jurisdiction over *both plaintiffs and defendants.*

As this Court recognized in *Panama R. R. Co.* v. *Johnson,* 364 U. S. 375 (1925), Congress frequently inaptly uses the word "jurisdiction" when it really means "venue."

The District Court and the Court of Appeals both held that the provision in question related merely to venue and that the Company had waived its right to assert the defense of lack of venue by failing to raise the defense seasonably. The Petition (p. 18) even admits that this Court has recognized that 301(c) is a venue provision. *Denver & R. G. R.R.* v. *Brotherhood of R.R. Trainmen,* 387 U. S. 556, 562 (1967).

Both Courts below found that the Company had waived its right to object to venue by not raising the question of venue until 18 months after service of the Complaint. This is in accord with F. R. Civ. P., Rule 12(b)(3) and 28 U.S.C. Sec. 1406(b), the latter reading:

> "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

Of course Plaintiff, having started the action, had thereby waived any right on its part to object to the venue, and a defendant has no right to object to the venue as to

any other party, whether plaintiff or defendant. *Burnrite Coal Briquette Company* v. *Riggs,* 274 U. S. 208, 211-2 (1927); *Commercial Casualty Co., Inc.* v. *Consolidated Stone Co.,* 278 U. S. 117 (1929); and *Industrial Additional Association* v. *Commissioner of Internal Revenue,* 323 U. S. 310 (1945).

Subject matter jurisdiction was granted *every* U. S. district court by Section 301 of the Taft-Hartley Act, 29 U.S.C. Sec. 185. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957). In addition, 28 U.S.C., Section 1391 (c) provides:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The lower courts could have found, if it had been necessary, in accord with 28 U.S.C. §1391(c), that the District Court had proper venue because the Company had applied for and been granted authorization to do business in New Jersey and had designated an agent in New Jersey upon whom process could be served and that this agent was the one upon whom the Summons and Complaint in this case had been served.

For either reason the argument in the Petition is without merit.

CONCLUSION

It is respectfully submitted that for the reasons hereinabove set forth, the Petition for Certiorari should be denied.

Respectfully submitted,

SAMUEL L. ROTHBARD,
ABRAHAM L. FRIEDMAN,
ROTHBARD, HARRIS & OXFELD,
744 Broad Street,
Newark, New Jersey 07102,
Attorneys for Respondents.